

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ZACHARY C.,

Petitioner,

vs.

TRI-COUNTIES REGIONAL CENTER,

Respondent

OAH No. L 2006080814

(Early Intervention Services Act
Gov. Code, § 95000 et seq.)

DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in San Luis Obispo, California, on September 15, 2006.

Petitioner was represented by his parents, Susan and Joseph C.

Respondent Tri-Counties Regional Center (TCRC) was represented by Fran Jorgenson, MSW, Assistant Director, Consumer Services.

The matter was submitted for decision on September 15, 2006.

ISSUES

The issues are:

1. Whether TCRC has properly determined petitioner's date of eligibility for Early Start services.
2. Whether TCRC is obligated to reimburse petitioner for a portion of the cost of medical services incurred between his birth and the date he was determined to be eligible for Early Start services.
3. Whether TCRC is obligated to reimburse petitioner for a portion of the cost of hernia surgery.

FINDINGS AND CONCLUSIONS

Factual and Procedural Background

Petitioner was born prematurely on June 22, 2004 and was diagnosed with Trisomy 21 (Down syndrome) with congenital heart defects. Following birth he was treated in the hospital's neonatal intensive care unit (NICU) before being discharged home on June 30, 2004. Although petitioner's parents were advised that the NICU had referred petitioner to TCRC, TCRC's records show that the referral was made by a public health nurse on July 26, 2004. Following an assessment by an interdisciplinary team, TCRC notified petitioner's parents on August 31, 2004, that their son had been determined eligible for services through the Early Start program. TCRC deems petitioner's date of eligibility to be August 31, 2004.

In June 2005, when he was one year old, petitioner underwent major abdominal surgery that included malrotation repair, duodenal stenosis correction and rectal biopsy. TCRC, determining that petitioner's surgery was related to Down syndrome, reimbursed petitioner's parents \$1,873.32 for their out-of-pocket costs (i.e., amounts not covered by their private health insurance) for the surgery.

In April 2006, when he was nearly two years old, petitioner underwent surgery for repair of an incisional hernia related to the prior year's abdominal surgery. In June 2006, petitioner's parents requested that TCRC reimburse them their out-of-pocket costs for this surgery (\$1,355.67), as well as their out-of-pocket costs (\$4,737.54) for a number of medical services that had been performed between petitioner's birth and August 31, 2004, the date TCRC found him eligible for Early Start services. Those services included echocardiograms, home visits by a nurse, hospitalization for apnea, lab fees, and a cardiac consultation. (Petitioner subsequently underwent heart surgery in December 2004 to correct his congenital heart defects.)

On August 4, 2006, TCRC denied the requests for reimbursement and petitioner appealed.

Applicable Law

The Individuals with Disabilities Education Act, Part C, 20 U.S.C. sections 1431-1445, established a program in which states were provided federal funds to develop and implement a statewide multidisciplinary system to provide early intervention services for infants and toddlers with disabilities and those who would be at risk of having substantial developmental delay if they did not receive early intervention services. (20 U.S.C. § 1431(b).) Regulations applicable to the early intervention program are found in 34 Code of Federal Regulations sections 303-303.654. In California, the early intervention program was established pursuant to the California Early Intervention Services Act, Government Code sections 95000-95029, and its implementing regulations, California Code of Regulations, title 17, sections 52000-52175. This federally funded program is known in California as "Early Start."

Parties' Positions

TCRC asserts that petitioner is not entitled to reimbursement for the cost of medical services incurred between his birth and the date he was determined to be eligible for Early Start services because nothing in the governing law allows “retroactive eligibility.” In addition, TCRC contends that the services for which petitioner seeks reimbursement are not covered under the program because they were not “necessary to enable [petitioner] to benefit from the other early intervention services” available under the program. (34 C.F.R. § 303.13(a).)

TCRC asserts that petitioner is not entitled to reimbursement for his hernia surgery because federal regulations, while providing that certain health services are covered under the early intervention services program, specifically exclude services that are “surgical in nature.” (34 C.F.R. § 303.13(c).) TCRC concedes that it paid a portion of petitioner’s previous abdominal surgery but asserts it did so mistakenly; TCRC felt that the procedure was related to petitioner’s Down syndrome but failed at the time to distinguish between surgical and non-surgical procedures. TCRC does not intend to seek repayment from petitioner for the amounts paid for his earlier surgery.

Petitioner asserts that all of the medical services for which reimbursement is requested, including the hernia surgery, are covered services under Early Start because the services were either necessary “to determine [petitioner’s] developmental status and need for early intervention services”¹ (34 C.F.R. § 303.12(d)(5)) or were “necessary to enable [petitioner] to benefit from the other early intervention services” available under the program. (34 C.F.R. § 303.13(a).) Petitioner further points out that early intervention services are made available to children “from birth” (34 C.F.R. § 303.16(a)) and that 34 Code of Federal Regulations section 303.345 provides that these services may commence before completion of the evaluation and assessment required to determine eligibility. Because petitioner’s chromosomal abnormalities were identified at birth he had “obvious immediate needs” that were known at the time of referral to TCRC and, it is argued, he therefore should have been deemed eligible before completion of the assessment process.

Petitioner’s parents point out that they have made good faith efforts to obtain other sources of payment for the medical expenses they have incurred. They applied to California Children’s Service (CCS) but were told they would not be eligible until they had spent a certain amount of out-of-pocket expenses. When they spent that amount they were told CCS would not pay retroactively. They applied for Supplemental Security Income but were

¹ Petitioner’s physician submitted a letter in which he stated, “The nature of the diagnostic procedures that were performed and the required hospitalizations provided vital information about [petitioner’s] medical status that directly affected future determination of developmental status in preparation for California Early Start Services.”

denied. They sought Medi-Cal but were advised they were ineligible.² Petitioner therefore argues that because California Code of Regulations, title 17, section 52109, subdivision (c), provides that use of a family's private insurance to pay for Early Start services is voluntary, and because subdivision (a) of that section makes the regional center the "payor of last resort" for eligible children, TCRC should be required to make the requested reimbursement.

Finally, petitioner maintains that even if TCRC is not mandated to provide the requested reimbursement, it can do so if it chooses, as evidenced by its previous reimbursement for petitioner's abdominal surgery.

Discussion

Eligibility Date and Request for Reimbursement for Medical Expenses from Birth to August 31, 2004

Once an infant has been referred for evaluation to determine eligibility for early intervention services the regional center has 45 days in which to complete its evaluation and assessment and, if the child is found eligible, to develop an individualized family service plan (IFSP). (Cal. Code Regs., tit. 17, §§ 52086, subd. (a), and 52102; 34 C.F.R. §§ 303.321(e)(2)(i) and 303.322.) The evaluation must be multidisciplinary in nature, must be conducted by trained personnel, must be based on informed clinical opinion, and must include a review of pertinent records, an evaluation of the child's level of functioning in specified developmental areas, and an assessment of the child's unique needs in each of those areas. (Gov. Code, § 95016, subd. (a); Cal. Code Regs., tit. 17, § 52082; 34 C.F.R. § 303.322.)

34 C.F.R. § 303.16(a) provides that early intervention services are available to children and toddlers with disabilities "from birth through age two." Government Code section 95001, subdivision (a)(1) and California Code of Regulations, title 17, section 52020 use similar language ("from birth through two years of age"; "between birth up to thirty-six months of age.") But given the complex statutory and regulatory requirements regarding eligibility, it seems unlikely that any child would literally be eligible "from birth." As set forth above, the initial evaluation must adhere to certain requirements that would necessarily take time, a fact that was recognized in giving regional centers 45 days in which to complete the task.

The evidence showed that TCRC acted in accordance with applicable statutes and regulations in determining petitioner's eligibility. Petitioner was referred to the regional center on July 26, 2004, and was found eligible under the Early Start program 36 days later,

² After TCRC denied petitioner's request for reimbursement of medical expenses, it re-evaluated petitioner and found him to be "Status 2," meaning he will be eligible for services under the Lanterman Act when he reaches age three. This determination allowed petitioner to become eligible for Medi-Cal through a Medicaid waiver, opening the way for coverage of future medical expenses.

on August 31, 2004. Because nothing in state or federal statutes or regulations provides for the retroactive provision of services once eligibility has been determined, petitioner's request to be deemed eligible from birth must be denied.

Most of the medical expenses for which petitioner seeks reimbursement occurred between his July 26, 2004 referral to TCRC and his August 31, 2004 eligibility date. 34 Code of Federal Regulations section 303.345 does provide that under certain circumstances services may commence before completion of a full eligibility evaluation and assessment. But these services cannot be provided without at least a preliminary evaluation, establishment of an interim IFSP, and a determination of need.³ The notes to this section indicate that one of the purposes of the section is "to facilitate the provision of services in the event that a child has obvious immediate needs that are identified, even at the time of referral (e.g., a physician recommends that a child with cerebral palsy begin receiving services as soon as possible.)" (34 C.F.R. § 303.345, Note (1).) The Early Start program is at its core an educational program, not a medical one. The very title of the federal law – the Individuals with Disabilities Education Act – demonstrates that. Most of the services available under the program are designed to meet a child's developmental needs. (See 34 C.F.R. § 303.12.) And as set forth in 34 C.F.R. § 303.13(a), the "health services" available under the program are only those "services necessary to enable a child to benefit from the other early intervention services . . . during the time that the child is receiving the other early intervention services." In other words, allowable medical services are those that occur while a child is receiving some other early intervention services and that are needed to allow him or her to benefit from those other services. Although it was known at the time of his referral to TCRC on July 26, 2004, that petitioner had a diagnosis of Trisomy 21, it was not shown that his needs had been identified and it is clear he was not then receiving any early intervention services. Thus, whatever medical services were recommended were not allowable "health services" within the meaning of 34 C.F.R. § 303.13(a).

Hernia Surgery

34 C.F.R. § 303.13, which defines allowable health services, very clearly excludes "services that are surgical in nature." (34 C.F.R. § 303.13 (c)(1)(i).) Even though petitioner's hernia surgery may have allowed him to benefit from other early intervention services, TCRC is not obligated to reimburse any portion of the costs of that procedure. The fact that TCRC mistakenly paid for a portion of an earlier surgery is irrelevant.

³ 34 C.F.R. § 303.345 provides: "Early intervention services for an eligible child and the child's family may commence before the completion of the evaluation and assessment in § 303.322, if the following conditions are met: . . . (b) An interim IFSP is developed that includes-- . . . (2) The early intervention services that have been determined to be needed immediately by the child and the child's family."

Payor of Last Resort

Even though California Code of Regulations, title 17, section 52109, subdivision (a), makes the regional center the “payor of last resort” for eligible children, that section cannot stand alone. A regional center can be payor of last resort only for services that are included within the scope of the Early Start program. Since the services for which petitioner seeks reimbursement do not fall within that scope, this section does not mandate reimbursement. And while it is true, at least in theory, that TCRC could “choose” to provide reimbursement for services it is not otherwise mandated to provide, it cannot be ordered to make that choice.

Conclusion

Petitioner has not established that he is entitled to an eligibility date earlier than August 31, 2004, or that TCRC is obligated to make reimbursement for the requested medical expenses.

ORDER

Petitioner’s appeal is denied.

DATED: _____

MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings